

Labor & Employment
ALERTFEBRUARY
2009COBRA AND THE ECONOMIC STIMULUS ACT:
WHAT EVERY EMPLOYER NEEDS TO KNOW**Background**

According to the most recent Department of Labor statistics, from December of 2008 to January of this year, the unemployment rate rose from 7.2% to 7.6%, and job losses in January were “large and widespread across nearly all major industry sectors.” According to the same statistics, over the past 12 months the number of unemployed persons has increased by 4.1 million and the unemployment rate has risen by 2.7%.

Undoubtedly, these grim numbers and the prospect of additional job-loss in the coming months contributed to Congressional passage of the American Economic Recovery and Reinvestments Plan (the “Act”) earlier this month, signed into law on February 17, 2009 (the “Effective Date”).

Within this omnibus law are the following new COBRA assistance provisions and obligations:

- COBRA premium assistance of 65% to employees who lost or lose their job (other than for gross misconduct) between September 1, 2008 and December 31, 2009 and elect COBRA continuation coverage (“**Assistance Eligible Individuals**”); and
- A special election period for COBRA continuation coverage and COBRA premium assistance for persons terminated between September 1, 2008 and February 16, 2009 (*i.e.*, prior to the Effective Date) who either: (i) did not elect COBRA continuation coverage; or (ii) elected COBRA continuation coverage but lost it prior to February 16, 2009.

This Alert summarizes these important new COBRA provisions and details considerations of which every employer covered by COBRA should be aware.

COBRA Prior to the Act

COBRA generally applies to all group health plans maintained by private-sector employers having 20 or more employees, and by state and local governments. COBRA requires continuation coverage of 18 or 36 months to be offered to covered employees, their spouses,

their former spouses, and their dependent children, when group health coverage otherwise would be lost by the occurrence of certain events. One of these events is the termination, or reduction in the hours, of a covered employee’s employment for reasons other than gross misconduct. Employers may require persons who lose their job and elect COBRA continuation coverage to pay the full cost of the health care coverage, plus a 2% administrative charge.

COBRA continuation coverage may expire upon the first to occur of:

- Failure to timely pay premiums in full;
- Cessation of the employer’s maintenance of any group health plan;
- Commencement of coverage under another group health plan of a qualified beneficiary after electing COBRA continuation coverage; or
- Entitlement of a qualified beneficiary to Medicare benefits after electing continuation coverage.

The Act**1. Reduction of COBRA Premiums.**

As discussed above, until the Act’s Effective Date, employees electing COBRA continuation coverage could be required to pay up to 102% of the COBRA continuation premiums. Now, under the Act’s COBRA subsidy provisions, an Assistance Eligible Individual may receive COBRA continuation coverage on payment of no more than 35% of the COBRA continuation premium. Thus, the Act reduces premiums for COBRA continuation coverage by 65% for Assistance Eligible Individuals.

Example: On March 1, 2009 Mike was terminated and is eligible to elect COBRA continuation coverage. The cost to Mike’s employer for health care coverage was \$300 per month. Prior to the Act, Mike’s COBRA continuation premium would have been \$306 (102% of the employer’s premium). The Act reduces Mike’s COBRA continuation

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premium to \$107.10 (i.e., 35% of \$306), and the difference of \$198.90 is the 65% subsidy.

This 65% subsidy is paid by the: (i) insurer, in the case of a fully insured plan; (ii) plan, in the case of a multiemployer plan; or (iii) employer/plan sponsor, in the case of a self-insured plan. The entity paying 65% of the premium is entitled to an offset to payroll taxes that is equal to the amount of the COBRA continuation coverage subsidy.

Assistance Eligible Individuals are entitled to the 65% subsidy for up to 9 months, or until an Assistance Eligible Individual becomes eligible for (as opposed to covered under) other group health coverage or Medicare benefits. For this purpose, “other group health coverage” does not include: (i) coverage consisting only of dental, vision, counseling or referral services (or a combination); (ii) treatment furnished at the employer’s on-site medical facility that is primarily first-aid, prevention or wellness care (or a combination); or (iii) coverage under a Health Reimbursement Arrangement or a Health Flexible Spending Arrangement.

Generally, premium subsidies are excludable from gross income of Assistance Eligible Individuals; *however*, those who generally earn more than \$145,000 (\$290,000 for joint returns) must report as income the full amount of the subsidy, and those who earn between \$125,000 and \$144,999 (or, more than \$250,000 but less than \$289,000 for joint returns) must report as income a percentage of the subsidy received in that year.

2. COBRA Special Election Period.

Under the Act, persons who experience a qualifying event in the form of an involuntary termination between September 1, 2008 and February 16, 2009 (i.e., prior to the Effective Date) who either (1) failed to or have not yet elected COBRA continuation coverage; or (2) elected COBRA continuation coverage but lost such coverage prior to February 16, 2009, *must be given an election notice within 60 days of the Effective Date*, and be given

60 days following the receipt of the election notice to *elect COBRA continuation coverage*. Those who elect COBRA continuation coverage during this special election period will be eligible for the 65% premium reduction for COBRA continuation coverage. If COBRA continuation coverage is elected via special election, COBRA coverage will reach back only to a date on or after the Effective Date – February 17 – and the eligibility period for coverage will be measured from the date of involuntary termination, generally extending for 18 months from that termination date.

Example: Steve was fired in a reduction in force on October 1, 2008. Although eligible for COBRA when fired, he did not elect COBRA. The Act directs that within 60 days of February 17, 2009 Steve must be offered the opportunity to elect COBRA, and he must have 60 days to elect such coverage. If Steve elects COBRA on March 1, 2009 his coverage begins on March 1, but his coverage period is measured from October 1, 2008 – his termination date.

Recommended Actions For Employers

The Act requires COBRA election notices to be revised to include information on COBRA premium assistance. Further, special notices must be sent within 60 days of February 17 (or by April 18) to both those entitled to the special election period and to Assistance Eligible Individuals already receiving COBRA coverage. Although the Department of Labor should issue model notices by March 19, there nonetheless are other important steps which should be taken in the interim.

While we counsel our clients on COBRA related issues as a matter of course, every client is unique and solutions must be specifically tailored. We look forward to the opportunity to assist with the new aspects of COBRA. ♦

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This document is a basic summary of legal issues. It should not be relied upon as an authoritative statement of the law. You should obtain detailed legal advice before taking legal action.

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